these past decisions were based. Also, developments in free speech and media law since 1975 suggest that the Commission should reconsider its position on its ability to regulate televised violence under the First Amendment.

75. In response to congressional concern about violent television programming, the Commission, in a 1975 brief to the Seventh Circuit Court of Appeals, "emphasized that in relying on industry self-regulation to reduce the level of violence it expected to see concrete results or further governmental intervention, to the extent constitutionally permissible, would be necessary. (emphasis added)."[161] Apparently, the Commission has in the past recognized that it has the authority to regulate television violence without violating the First Amendment. Unfortunately, this position, that the First Amendment would not prevent the Commission from regulating televised violence should industry self-regulation prove ineffective, has yet to be acted upon by the Commission. The failure of industry self-regulation should by now have prompted the Commission to act.

76. The Commission's conclusions about limitations on its ability to regulate televised violence may have been warranted in the early 1970's, but the case law implicating

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[161]Writers Guild of America, W., Inc. v. FCC, 423 F. Supp. 1064, 1156 (C.D. Cal. 1976), vacated on other grounds, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980)(quoting Government Brief filed April 6, 1975, in The Polite Society, Inc v. FCC, No. 75-2044 (7th Cir. 1975), review denied, 541 F.2d 283 (7th Cir. 1976)).

that ability was much less encouraging then than it is today. A careful examination of the development of First Amendment jurisprudence since the 1970's suggests that the Commission's initial decisions on the subject now lack support. The Commission's initial analysis of the extent to which it is constrained by § 326 of the 1934 Communications Act is also outdated. In 1978 the Supreme Court, in FCC v. Pacifica Foundation, held that § 326 of the 1934 Communications Act "unequivocally denies the Commission any power to edit proposed broadcasts in advance . . . but this has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties."[162] Because the proposed Rules do not contemplate editing programs in advance of transmittal, they would not violate § 326's prohibition on censorship.

77. Pacifica is probably the most important precedent with respect to the constitutionality of the proposed Rules. In Pacifica the Supreme Court held that the Commission has the authority to sanction licensees for broadcasting constitutionally protected but indecent material "at times of the day when there is a reasonable risk that children may be in the audience."[163] The restrictions embodied in the proposed Rules are similar to the restriction upheld in

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[162]Pacifica, 438 U.S. at 735(citation omitted).

[163]Id. at 732(citing the Commission's Declaratory Order below, 56 F.C.C.2d 94, 98 (1975)).

Pacifica. They differ only in that they apply to television rather than radio, and they are designed to protect children from material that is known to be harmful rather than from material that is more offensive than harmful. The Petitioner is not aware of any evidence demonstrating the harmfulness of vulgar language similar to the results of the studies discussed supra showing that televised violence harms children. Surely the government's interest in protecting children from excessive dramatized violence on television is at least as strong as its interest in protecting children from "dirty words" in radio programming.

78. In Ferber, which involved balancing free speech interests and the welfare of children, the Supreme Court held that is "evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor,' is compelling."[164] Additionally, the Court noted in Ferber that it has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights."[165] Although the proposed Rules may also operate "in the sensitive area of constitutionally protected rights," they serve the compelling governmental interest in protecting the well-being of minors. The results of

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[164]New York v. Ferber, 458 U.S. 755, 757(quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).
[165]Id.

scientific studies and the findings of medical authorities cited supra should be sufficient to establish the threat posed to children's well-being by televised violence.

79. Pacifica is part of a well-established tradition of recognizing less expansive First Amendment protection for the electronic media than for other forms of speech. As the Court noted in League of Women Voters, "[T]he broadcasting industry plainly operates under restraints not imposed upon other media . . . ."[166] In the same case, the Court described Pacifica as "consistent with the approach taken in [the Court's] other broadcast cases."[167] As noted in an article printed in the Yale Journal on Regulation in 1988, "From 1927 to the present day, only once has the Supreme Court held any regulation of broadcast content unconstitutional. That one case was FCC v. League of Women Voters, which invalidated a prohibition on editorializing by public stations that receive federal funds."[168] The article continues to note that the Supreme Court considers it a "fundamental proposition" that "there is no unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[169]

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[166]FCC v. League of Women Voters, 468 U.S. 364, 380 (1984).
[167]Id. at 380, n. 13.
[168]Dyk, Full First Amendment Rights for Broadcasters: The Industry as Eliza on Ice and Congress as the Friendly Overseer, 5 Yale Journal on Regulation 299, 308 (1988)(citing League of Women Voters, 468 U.S. 364 (1984)).
[169]FCC v. Nat'l Citizen's Comm. for Broadcasting, 436 U.S. 775, (1978)(citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969)).

80. The restraint on editorializing in League of Women Voters was unconstitutional because it did not satisfy the requirements established by the Court's prior broadcasting decisions.[170] As explained by the Court, restrictions on broadcasting will be upheld if they are "narrowly tailored to further a substantial governmental interest," (citations omitted) and deciding whether a restriction meets this test "requires a critical examination of the interests of the public and broadcasters in light of the particular circumstances of each case."[171] While the restriction in League of Women Voters concerned "a form of speech -- namely, the expression of editorial opinion -- that lies at the heart of First Amendment protection,"[172] the proposed Rules do not. Depictions of dramatized violence surely lie at the periphery of the area of speech protected by the First Amendment, if not outside it. The Supreme Court noted in Red Lion, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . ."[173] The Petitioner submits that excessive amounts of dramatized violence on television contributes very little of value to the marketplace of ideas. If anything, violent programming detracts from the free exchange of ideas by teaching children to solve their disagreements through fighting

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[170] League of Women Voters, 468 U.S. at 381.
[171] Id. at 380-81(citing Pacifica).
[172] Id. at 381.
[173] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1968); see also Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965).

rather than through rational discussion. As further explained infa, the proposed Rules are permissible restrictions on broadcast television under the standard articulated in League of Women Voters. Cable television may warrant a slightly different analysis under existing case law, but the proposed Rules are permissible as applied to cable television as well. The few restrictions on cable programming that have been found to violate the First Amendment were all unconstitutionally overbroad, unconstitutionally vague, not designed to protect children, or lacking provisions for a "safe harbor period" for the programming involved.[174] However, none of the Rules proposed by the Petitioner suffer from such infirmities.

81. The restrictions the proposed Rules would impose on cable television would be permissible under current First Amendment doctrine. The "precise degree of first amendment protection enjoyed by cable operators" has not been definitely established.[175] However, the Court of Appeals, in striking down "must carry" rules, has applied the O'Brien test "of a substantial governmental interest furthered by means no greater than are essential to the furtherance of

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[174]See Home Box Office v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 125 (S.D. Fla. 1983), aff'd, 755 F.2d 1415 (11th Cir. 1985); Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D.C. Utah 1985), aff'd sub. nom. Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), aff'd 480 U.S. 926 (1987).

[175]Century Communications Corp. v. FCC, 835 F.2d 292, 295 (D.C. Cir. 1987), clarified, 837 F.2d 517 (D.C. Cir.), cert. denied, 486 U.S. 1032 (1988).

that interest," as a First Amendment standard for regulations on cable television.[176] In O'Brien, which involved a protestor burning a draft card as a political statement, the Supreme Court held that a governmental regulation that incidentally burdens First Amendment rights "is sufficiently justified if it furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential for the furtherance of that interest."[177] A programming regulation permissible under the "narrowly tailored to further a substantial governmental interest" standard applicable to broadcasting regulations would also be permissible under the "essential to the furtherance of an important or substantial governmental interest" applicable to cable regulations if the purpose of the regulation could not be achieved absent the regulation. To protect children from televised violence, the proposed Rules should be applied to cable television as well as broadcast television.

82. As discussed supra, the television industry has proven incapable of regulating itself with respect to televised violence. Cable industry representatives might argue that regulating violent cable programming is not

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[176]Century Communications, 835 F.2d at 295. See also Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied sub. nom. Nat'l Assoc. of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169).

[177]United States v. O'Brien, 391 U.S. 367, 377 (1968).

essential to protect children on the theory that "lock boxes" or other devices provide adequate safeguards. The weakness of this argument is apparent from the continuing exposure of children to violent cable programming in spite of the current availability of "lock boxes" and other hardware and software designed to limit children's access to cable programming. Even if lock boxes are adequate safeguards against children being exposed to obscene or indecent programming, violent programming presents a different problem because it is currently more common in programming that targets children, as well as more likely to be found in many different types of programming and at more various times of day, than obscene or indecent programming. Such technological "fixes" represent only added expense for the cable consumer, and they do not adequately protect children from the pervasive problem of televised violence. Parents should not be required to pay extra for equipment to protect their children from harmful programming material injected into a service for which they may already be paying too much. Two important factors in the Supreme Court's rationale in Pacifica for upholding the Commission's regulation of indecent radio broadcasting were "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and "broadcasting is uniquely accessible to children, even those too young to

read."[178] The same is true of cable television. Lock boxes and other similar means of restricting children's access to harmful programming cannot reliably protect children from exposure to televised violence because parents cannot anticipate every act of violence portrayed in television programs, including those transmitted by cable. As the Pacifica court noted, "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."[179] The same is true of the cable television audience. As with indecent language in radio broadcasting, the only way to protect children from excessive violence in cable television programming is for the Commission to restrict the programming at its source by issuing rules similar to those proposed herein.

83. Under current First Amendment case law, regulations on either broadcast or cable television programming must serve a "substantial" governmental interest.[180] The proposed Rules further a governmental interest that is at least "substantial." In explaining how the Children's Television Act of 1990 serves a "substantial interest," the House Committee on Energy and Commerce notes, "[I]t is difficult to think of an interest more substantial than the promotion of the welfare of children," and "it is

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[178]Pacifica, 438 U.S. at 748-49.
[179]Id. at 748.
[180]See League of Women Voters, 468 U.S. at 380; Century Communications, 835 F.2d at 295.

this interest which has justified "channeling" of other constitutionally-protected speech, such as "indecent" programming."[181] The Committee also noted that promoting "the content-neutral and significant governmental interest in safeguarding the well-being of the nation's youth" is permissible under the First Amendment.[182]

84. Still, there are those who argue that cable television should not be regulated to protect children from violent programming. According to our last President's justification for not signing the Children's Television Act of 1990, "the proliferation of new video services" has weakened the "scarcity of broadcast frequencies" justification for content-based programming regulation.[183] President Bush's argument continued, "Red Lion's technological scarcity" theory does not apply to cable service, which should be considered analogous to the print media under the First Amendment."[184] However, this argument is disingenuous at best because protecting children from harmful programming does not depend on a frequency scarcity rationale. Bush's argument misses the point of the Pacifica opinion, that some programming regulations may be justified not by frequency scarcity, but rather by the pervasive nature of the programming involved and the harm it causes

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[181]H.R. Rep. No. 101-385, 101st Cong., 2d Sess., reprinted in 1990 U.S.C.C.A.N. 1609, 1616.
[182]Id. (citing Renton v. Playtime Theatres, 475 U.S. 41 (1986)).
[183]President's Statement on the Children's Television Act of 1990, 26 Wkly Comp. Pres. Doc. 1611, 1612 (Oct. 17, 1990)(explaining the President's disapproval of the Act).
[184]Id. (citing Red Lion).

children.[185] The pervasiveness of violent cable television programming has reached a level that justifies concerns similar to those involved with indecent radio broadcasting. According to a recent finding by Congress,

> There has been a substantial increase in the penetration of cable television systems over the past decade. Nearly 56,000,000 households, over 60 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase. As a result of this growth, the cable television industry has become a dominant nationwide video medium.[186]

Applying the proposed Rules to cable television is justified not by frequency scarcity or a shortage of cable channels, but by the pervasiveness of violent cable programming and the harm it does to children.

85. The Commission stated that, out of all the reasons for issuing the restriction upheld in Pacifica, it was particularly concerned about children having unsupervised access to indecent material.[187] As the Commission recognized in its 1975 Report on the Broadcast of Violent, Indecent, and Obscene Material, "the intrusion of offensive matter into the home under circumstances where it is not expected and cannot always be monitored by adults is a matter of legitimate concern."[188] Cable television is similar to radio not only in terms of pervasiveness, but also in the fact that many children have access to both without adult

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[185]See Pacifica, 438 U.S. 726 (1978).
[186]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).
[187]56 F.C.C.2d 94, 97 (declaratory order issued Feb. 21, 1975).
[188]51 F.C.C.2d at 441.

supervision. Another similarity between the proposed Rules and the regulation upheld in Pacifica is that both do not flatly ban objectionable programming, but instead "channel" it so that children are not likely to be exposed to it.[189] This distinguishes the proposed Rules from other programming regulations that have been found to violate the First Amendment by failing to leave open a "safe harbor" period in which the programming they affected could be shown.[190]

86. Whether or not different First Amendment standards for broadcasters and cable operators should be justified by frequency scarcity arguments, protecting children from harmful programming does not depend on a frequency scarcity rationale. As the Commission pointed out in Pacifica, two of the reasons broadcasting enjoys less freedom than other media are that children often have unsupervised access to broadcast material and such material is received "in the home, a place where people's privacy interest is entitled to extra deference."[191] The same reasoning applies to cable television. The Pacifica court's justification of a special First Amendment standard to protect children from radio programming did not depend on the frequency scarcity argument made in Red Lion. The Pacifica court recognized, "The broadcast media have established a uniquely pervasive

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[189]Pacifica, 438 U.S. at 732-33(citing 59 F.C.C.2d 892 (1976).
[190]See, e.g., Community Television v. Wilkinson, 611 F. Supp. 1099 (D.C. Utah 1985), aff'd, sub. nom. Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), aff'd 480 U.S. 926 (1987).
[191]Pacifica at 731, n. 2.

presence in the lives of all Americans," and the broadcast of offensive material infringes on the individual's right to be let alone in his own home, "which plainly outweighs the First Amendment rights of an intruder."[192] As the Pacifica court noted, "[B]roadcasting is uniquely accessible to children," and it, unlike other forms of expression, cannot be "withheld from the young without restricting the expression at its source."[193] This reasoning applies to cable television as well as broadcast television because of the ineffectiveness of lock boxes and similar means of restricting children's access to violent cable programming as discussed supra. The pervasiveness and accessibility to children of violent cable programming, rather than some notion of channel scarcity, justify regulations to protect children from televised violence.

87. The proposed Rules do not contemplate a total ban on violence in television programming similar to the total ban on indecent commercial telephone communications held unconstitutional in Sable Communication.[194] There are also significant differences between dial-a-porn services and cable television. In Sable Communications the Supreme Court held that § 223(b) of the Communications Act of 1934, as amended in 1988, unconstitutionally restricted speech in part because the telephone communications in question were

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[192]Id. at 740(citing Rowan v. Post Office Dept., 397 U.S. 728 (1970).
[193]Id. at 749.
[194]Sable Communications v. FCC, 492 U.S. 115, 122-23 (1989).

not "uniquely pervasive" or uniquely accessible to children" as was the radio broadcast in Pacifica.[195] The proposed Rules are more like the radio regulation upheld in Pacifica than the dial-a-porn regulation struck down in Sable Communications. While children do not typically use dial-a-porn services, they do typically watch television at least as much as they listen to the radio. Also, the Sable Communications court noted, "Pacifica is readily distinguishable from this case most obviously because it did not involve a total ban on broadcasting indecent material."[196] Similarly, the proposed Rules do not contemplate a total ban on excessively violent programming, but rather a system of safeguards designed to protect children primarily by channelling such programming to times when children are not likely to be exposed to it. The proposed Rules would leave open a "safe harbor" period from 10:00 p.m. to 6:00 a.m., during which excessively violent programming could be transmitted.[197] An even narrower safe harbor period, from 12:00 a.m. to 6:00 a.m., part of a restriction on graphic anti-abortion advertisements imposed for "the protection of children from inappropriate broadcast material," was recently found sufficient for First Amendment purposes by a Federal Court.[198]

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[195] Id. at 127.

[196] Id.

[197] See alternate versions of Petitioner's proposed Rule 1(a) supra at pp. 1-2, 32-33.

[198] Gillett Communications of Atlanta Inc. v. Becker, 61 U.S.L.W. 2292 (N.D. Ga. Oct. 30, 1992)(No. 1:92-cv-2544-RHH).

88. The Commission should not be dissuaded from applying the reasoning of Pacifica to cable television in order to protect children from violent programming by the cable industry's argument that cable television should be treated analogously to print media for First Amendment purposes. As mentioned supra, Pacifica did not depend on a frequency scarcity rationale. Red Lion's technological scarcity rationale and other equal time considerations are irrelevant to the issues involved in protecting children from violent programming. As Senator Danforth's remarks on the Children's Television Act of 1990 in the Congressional Record explain, "Children do not distinguish between cable and over-the-air broadcasts when they watch television."[199] Cablecasts should be regulated similarly to over-the-air broadcasts because they have the same potential for harm to children. The right to be left alone in one's own home and the government's interest in protecting the welfare of children outweigh the limited free speech rights of cable companies as well as radio broadcasters.

89. Pacifica held that the Commission's authority to restrict non-obscene speech for the protection of children did not "by any means reduce adults to hearing only what is fit for children," under Butler, since adults who wanted to hear George Carlin's monologue could have purchased recordings of it, or the monologue could have been broadcast in the late evening when there were few children in the

[199]136 Cong. Rec. S13552, S13555 (daily ed. Sept. 24, 1990).

listening audience.[200] Pacifica extended to the broadcast media and to non-obscene expression Ginsberg's holding, that regulating expression in the print media, even expression that is protected as to adults, is justified by "the government's interest in the "well-being of its youth," and in supporting "parents' claim to authority in their own household . . . ."""[201] These reasons for regulating indecent radio programming apply all the more to broadcast and cable television programming containing an excessive amount of dramatized violence. They also cast additional doubt on any argument by the cable television industry to the effect that cable television should be exempt from the proposed Rules.

90. While, as discussed supra, cable television is not entitled to the same degree of First Amendment protection as that enjoyed by the print media, even if it were, the restrictions imposed by the proposed Rules would still be permissible under the First Amendment. A recent Supreme Court case, St. Paul, sets out current formulations of various exceptions to the First Amendment prohibition on abridging the freedom of speech. The St. Paul decision invalidated an ordinance proscribing "hate speech" because it prohibited "otherwise permitted speech solely on the basis of the subjects the speech addresses."[202] It is worth

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[200]Pacifica, 438 U.S. at 750, n. 28(citing Butler v. Michigan, 352 U.S. 380, 383 (1957)).
[201]Id. at 749-50(citing Ginsberg, 390 U.S. 629 (1967)).
[202]R.A.V. v. St. Paul, 60 U.S.L.W. 4667, 4672 (U.S. June 22, 1992)(No. 90-7675).

noting that the proposed Rules discriminate among television programs not on the basis of the subjects they address or the messages they convey, but on the amount of dramatized violence they contain. The amount of dramatized violence depicted in a television program is independent of the subject or message of that program. Under the proposed Rules, telecasters would be free to address any subject or convey any message: the only limitations on their programming would be those necessary to protect children from excessive dramatized violence, which is extraneous to the subject or message of programming.

91. The St. Paul majority notes that the Supreme Court has "long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses -- so burning a flag in violation of an ordinance against outdoors fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not."[203] This exception could apply to the proposed Rules because they restrict a nonverbal expressive activity, the broadcast or transmittal of television programs containing an excessive amount of dramatized violence, not because of any ideas expressed by the material containing the violence, but rather because of the action involved: showing excessively violent material on television at times children are likely

[203] St. Paul, 60 U.S.L.W. at 4669-70(citations omitted).

to be in the viewing audience. Additionally, even if the proposed Rules were content-based rather than content-neutral for First Amendment Purposes, they would still be permissible because they are justified by reference to the "secondary effects" of excessively violent programming rather than by reference to any message conveyed by such programming.[204] As explained in a recent Federal court decision, "The only exception that can permit some content-based regulations is the "secondary effects" test, which has often been employed to justify regulation of speech and expression on sexual topics."[205] The Petitioner asks the Commission to issue the proposed Rules not because televised violence is offensive, but because its secondary effects are harmful.[206] Under the secondary effects doctrine, the proposed Rules would be permissible under the First Amendment even if they were to be considered content-based rather than content-neutral.

92. Another category of First Amendment exceptions discussed in the St. Paul opinion, reasonable "time, place, or manner" restrictions, provides the most obvious basis for finding that the restrictions in the proposed Rules would not violate the First Amendment. Out of all the First

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[204]See Id. at 4670(citing Renton, 475 U.S. at 48; Young v. American Mini Theatres, Inc., 427 U.S. 50, 71, n. 34 (1976); Barnes v. Glen Theatre, 59 U.S.L.W. 4745, 4748 (June 21, 1991)(No. 90-26).

[205]Citizens United for Free Speech v. Long Beach Township Board of Commissioners, 802 F. Supp. 1223, 1233 (D.N.J. 1992)(citing Barnes, Renton and Young).

[206]See Young, 427 U.S. at 71, n. 34.

Amendment exceptions to be found in current case law, the programming restrictions contained in the Petitioner's proposed Rules are best classified as time, place and manner restrictions. The Court indicates that such restrictions are permissible if they are "justified without reference to the content of the regulated speech."[207] The case cited for this proposition, Ward v. Rock Against Racism, upheld a municipal regulation of sound amplification at outdoor concerts as a reasonable time, place and manner restriction on protected speech.[208]

93. The Court granted certiorari in Ward "to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech."[209] In Ward the Court stated: "The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[210] The restrictions contained in the proposed Rules are time, place, and manner restrictions that do not discriminate among television programs on the basis of the messages they convey. Excessive violence does not convey a message with which the government agrees or disagrees, and the proposed

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[207]St. Paul at 4670(citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
[208]Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).
[209]Id. at 789.
[210]Id. at 781(citing Clark v. Community for Creative Nonviolence, 468 U.S. 288, 295 (1984)).

Rules are justified not by reference to any message conveyed by violent programming, but by that programming's potential for harm to children. As the Ward opinion explains, "The government's purpose is the controlling consideration," in deciding questions of content-neutrality.[211] Because the purpose of the proposed Rules is to mitigate harm, rather than to favor or disfavor any particular point of view, the proposed Rules are content-neutral for First Amendment purposes. This is true even though violence might be considered "content" in the ordinary sense of the word as it is used outside the field of First Amendment jurisprudence. The amount of violence in television programming no more conveys a message or represents a particular point of view than does the volume level of an outdoor concert.

94. The proposed Rules are analogous to the regulation of music volume in Ward. The amount of dramatized violence in television programming is similar to the volume of amplified music in that the regulation of both is justified without reference to the message or viewpoint of the programs or music involved. This similarity suggests that the limitations contained in the proposed Rules would qualify as content-neutral time, place, or manner restrictions even if broadcasting or cable television were equivalent to print media for First Amendment purposes. The Ward decision also states that time, place, and manner

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[211] Id.

regulations need not be analyzed under a least restrictive means test. As the Court explains, "Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests, but that it need not be the least restrictive or least intrusive means of doing so."[212]

95. Because the proposed Rules are time, place and manner regulations, the permissibility of their application to cable television should arguably be analyzed without reference to the "essential to the furtherance of an important or substantial governmental purpose" test of O'Brien that the Court of Appeals has applied to "must carry" rules, although they would pass that test as well.[213] Ward continues, "[T]he requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.""[214] Under this analysis, the proposed Rules satisfy the requirement of narrow tailoring. They promote the government's compelling, or at least substantial, interest in protecting children from excessive dramatized violence on television. As discussed supra, this interest would not merely be achieved less

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[212]Id. at 798(citations omitted).
[213]See O'Brien, 391 U.S.at 377; Century Communications, 835 F.2d at 295.
[214]Ward at 781(citing United States v. Albertini, 472 U.S. 675, 689 (1985)).

effectively absent the proposed Rules, it probably would not be achieved at all.

96. In 1979 a Federal court recognized that scientific evidence of the danger posed by televised violence might someday justify increased governmental regulation of television programming. The Zamora court denied recovery of tort damages from broadcasters for a murder committed by a boy who watched an extremely high amount of televised violence on the ground that imposing civil liability in such a case would violate the First Amendment.[215] However, the Zamora court also noted, "One day, medical or other sciences with or without the cooperation of programmers may convince the F.C.C. or the Courts that the delicate balance of First Amendment rights should be altered to permit some additional limitations in programming."[216] The scientific evidence discussed supra is exactly the type of evidence foreseen in 1979 by the Zamora court.

97. The Petitioner simply asks that the Commission acknowledge and act upon the extensive empirical evidence that televised violence is a serious problem. Excessive amounts of dramatized violence in television programming is at least as deserving of regulatory attention as indecent language in radio programming or excessively loud music at an outdoor concert. The fact that the television industry

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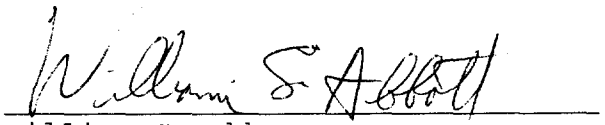
[215] Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199, 200-01, 206 (S.D. Fla. 1979).
[216] Id. at 206-07.

has had over twenty years to reduce voluntarily the amount of violence on television to safe levels, and has yet to do more than issue statements and guidelines that are never followed, suggests that the time for appropriate regulatory action has finally arrived.

WHEREFORE, the Petitioner, the Foundation to Improve Television, respectfully requests that the Commission amend its Rules and Regulations to include the following new Section 73.___ or issue one or more rules similar to those contained therein.

RESPECTFULLY SUBMITTED this 25th day of March, 1993,

FOUNDATION TO IMPROVE TELEVISION
By its attorney,



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